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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MAX JANIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional provision involved	2
Statement	2
Summary of argument	8
Argument:	
A federal civil tax assessment is valid even though based upon evidence obtained by local law enforcement officers pursuant to a search warrant subsequently held to be defective	15
A. A tax assessment challenged in a refund suit or in a collection proceeding is deemed to be valid unless the taxpayer meets the burden of proving that he paid the correct amount of his liability	15
B. The exclusionary rule should not be applied in this civil tax case	28
Conclusion	42

CITATIONS

Cases:	
Aguilar v. *Texas*, 378 U.S. 108	6
Alderman v. *United States*, 394 U.S. 165	31
Berkowitz v. *United States*, 340 F. 2d 168	36

Cases—Continued Page

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 33
Bob Jones University v. *Simon*, 416 U.S. 725 18
Botany Mills v. *United States*, 278 U.S. 282 16
Boyd v. *United States*, 116 U.S. 616 ..... 35, 36
Brown v. *Illinois*, No. 73-6650, decided June 26, 1975 40
Bull v. *United States*, 295 U.S. 247 ..... 18, 19
Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 36
Chavez-Raya v. *Immigration and Naturalization Service*, C.A. 7, No. 74-1482, decided July 16, 1975 37
Cleary v. *Bolger*, 371 U.S. 392 35-36
Compton v. *United States*, 334 F.2d 212 ..... 11, 12, 23, 24, 25
Costello v. *United States*, 350 U.S. 359 26
Crosby v. *United States*, 496 F.2d 1384 18
Eaton v. *Price*, 364 U.S. 263 39-40
Elkins v. *United States*, 364 U.S. 206 ..... 29, 30, 31, 35, 38
Gordon v. *United States*, 451 F.2d 1354 20
Grosso v. *United States*, 390 U.S. 62 36
Harris v. *New York*, 401 U.S. 222 31
Honeycutt v. *Aetna Insurance Co.*, 510 F.2d 340, certiorari denied, No. 74-1306, June 9, 1975 37
Jones v. *United States*, 362 U.S. 257 31
Knoll Associates, Inc. v. *Federal Trade Commission*, 397 F.2d 530 37

Cases—Continued Page

Lewis v. *Reynolds*, 284 U.S. 281, affirming 48 F.2d 515 ..... 16, 21
Linkletter v. *Walker*, 381 U.S. 618 31
Lucas v. *Structural Steel Co.*, 281 U.S. 264 ..... 19, 21
Magnano Co. v. *Hamilton*, 292 U.S. 40 36
Mapp v. *Ohio*, 367 U.S. 643 ..... 22, 30, 31
Marchetti v. *United States*, 390 U.S. 39 36
Michigan v. *Tucker*, 417 U.S. 433 ..... 14, 39, 40
National Labor Relations Board v. *South Bay Daily Breeze*, 415 F.2d 360, certorari denied, 397 U.S. 915 37
Pizzarello v. *United States*, 408 F.2d 579 37
Plisco v. *United States*, 306 F.2d 784, certiorari denied, 371 U.S. 948 18
Plymouth Sedan v. *Pennsylvania*, 380 U.S. 693 35
Psaty v. *United States*, 442 F.2d 1154 ..... 18, 24
Reinecke v. *Spalding*, 280 U.S. 227 16
Silverthorne Lumber Co. v. *United States*, 251 U.S. 385 ..... 37, 38
Sonzinsky v. *United States*, 300 U.S. 506 36
Spinelli v. *United States*, 393 U.S. 410 ..... 6, 40
Stone v. *White*, 301 U.S. 532 16
Suarez v. *Commissioner*, 58 T.C. 792 ..... 21, 37, 38
Suarez v. *Commissioner*, 61 T.C. 841 22
Tehan v. *Shott*, 382 U.S. 406 31
Terry v. *Ohio*, 392 U.S. 1 31
United States v. *Anderson*, 269 U.S. 422 16
United States v. *Bisceglia*, 420 U.S. 141 26
United States v. *Blue*, 384 U.S. 251 27
United States v. *Butler*, 156 F.2d 897 36

Cases—Continued

	Page
United States v. *Calandra*, 414 U.S. 338	12-13, 26, 31, 32, 33, 34, 38, 39
United States v. *Harris*, 403 U.S. 573	40
United States v. *Hodes*, 355 F.2d 746	17
United States v. *Overman*, 424 F.2d 1142	17
United States v. *Peltier*, No. 73-2000, decided June 25, 1975	38, 39
United States v. *Physic*, 175 U.S. 338	36
United States v. *Powell*, 379 U.S. 48	26
United States v. *Rexach*, 482 F.2d 10, certiorari denied, 414 U.S. 1039	18
United States v. *Sanchez*, 340 U.S. 42	36
United States v. *Sullivan*, 274 U.S. 259	36
United States ex rel. Sperling v. *Fitzpatrick*, 426 F.2d 1161	37
Walder v. *United States*, 347 U.S. 62	24, 31
Walker v. *United States*, 125 F.2d 395	36
Weeks v. *United States*, 232 U.S. 383	22, 30
Welch v. *Helvering*, 290 U.S. 111	19, 21
Wickwire v. *Reinecke*, 275 U.S. 101	16
Wolf v. *Colorado*, 338 U.S. 25	30

Constitution, statutes, and regulations:

	Page
United States Constitution, Fourth Amendment	2, 8, 9, 22, 30, 33, 37-38, 40
Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 4401	5, 13, 20, 34, 36
Sec. 4411	36
Sec. 6001	20
Sec. 6201	15, 25

Constitution, statutes, and regulations—Continued

	Page
Sec. 6301	25
Sec. 6322	17
Sec. 6331	15, 17
Sec. 6502	17
Sec. 7401	17
Sec. 7403	17
Sec. 7601(a)	25
Sec. 7801(a)	25
Sec. 7802	25
28 U.S.C. 1962	17
Rule 69(a), Federal Rules of Civil Procedure	17
Rule 142(a), Rules of Practice and Procedure of the United States Tax Court (1974)	21

Miscellaneous:

	Page
Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378 (1964)	31
Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970)	33

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OPINIONS BELOW

The findings of fact, conclusions of law and order of the district court (Pet. App. 1A-11A) are not officially reported. The memorandum of affirmance of the court of appeals (Pet. App. 12A) is not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13A) was entered July 22, 1974. A petition for rehearing was denied on September 5, 1974 (Pet. App. 14A). By order dated November 27, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including February 2, 1975 (a Sunday). The petition for a writ of

certiorari was filed on February 3, 1975, and was granted on June 9, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal civil tax assessment is invalid when the Internal Revenue Service's knowledge of the taxpayer's liability and its computation of the amount due are based upon evidence obtained by local law enforcement officers pursuant to a search warrant subsequently held to be defective.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

On November 26, 1968, the Los Angeles Police Department obtained a warrant directing a search for bookmaking paraphernalia on the persons of respondent and of Morris Levine, and at certain specified locations. The warrant was issued by a judge of the Municipal Court of the Los Angeles Judicial District and was based upon an affidavit of a police officer (Pet. App. 3A; Pltf. Exs. 1, 2; A. 67-74).

In support of the issuance of the search warrant, the police officer's affidavit stated as follows: Within the preceding two weeks, a confidential and reliable informant had told the officer that respondent and Levine were engaged in taking bets on certain unlisted telephone numbers assigned to them, which were located at two specified addresses. The informant had never in the past given information to the police that proved to be incorrect, and information given by him had led to the arrest of two other persons on bookmaking charges. Five days earlier, a fellow policeman advised the officer that another reliable informant had told him that respondent and Levine were currently conducting bookmaking activities at one of the locations specified in the affidavit. This other informant had previously given the police information that resulted in at least two arrests and convictions for illegal bookmaking activity. Both respondent and Levine had previously been arrested several times for bookmaking offenses, and each had been convicted once on such charges. Based upon the officer's six and one-half years of police experience, which included two years of full-time assignment to the Vice and Bookmaking Detail of the Los Angeles Police Department, he was of the opinion that respondent and Levine were conducting a bookmaking operation at the specified locations. The officer further stated that there was probable and reasonable cause to believe that there was property

at those locations that was used by respondent and Levine as the means of committing a felony (A. 39-46; Pltf. Ex. 2, A. 69-74).

In the ensuing search on November 30, 1968, conducted pursuant to the warrant by Los Angeles police officers, respondent and Levine were arrested and the police seized certain property. The seized property included $4,940 in cash and wagering records that belonged to respondent. Shortly thereafter, the Los Angeles police officer who had prepared the affidavit in support of the search warrant notified a revenue agent of the Internal Revenue Service that respondent had been arrested for bookmaking activity. Together with a Los Angeles police officer familiar with the codes used by bookmakers, the revenue agent analyzed the wagering records obtained pursuant to the search warrant and determined the exact gross volume of respondent's gambling enterprise for the five days immediately preceding his arrest. The Los Angeles police officer further informed the revenue agent that he had conducted a surveillance of respondent's activities that indicated that respondent was engaged in bookmaking activity during the 77-day period from September 14, 1968, through November 30, 1968, the day of his arrest (Pet. App. 3A-5A; A. 26-38).

Respondent had not filed any federal or state tax returns pertaining to his bookmaking activities for the period from September 14, 1968, through November 30, 1968. Based upon its examination of the evidence obtained by the Los Angeles police, the Internal Revenue Service, on December 5, 1968, made an assessment against respondent and Levine for wagering taxes imposed by Section 4401 of the Internal Revenue Code of 1954 in the amount of $89,026.09 plus $123.97 of interest. The amount of the assessment was computed by determining respondent's average daily gross proceeds for the five-day period covered by the wagering records analyzed by the revenue agent and multiplying the resulting figure by 77, the period of police surveillance of respondent's activities. Pursuant to the assessment, the Internal Revenue Service exercised its statutory power to levy upon the $4,940 in cash that had been seized by the Los Angeles police, in partial satisfaction of respondent's tax liability (Pet. App. 5A-6A; A. 18-19).[1]

Respondent and Levine were prosecuted for violation of local gambling laws. On February 18, 1969, they moved to quash the search warrant before the same Municipal Court judge who had issued the warrant. They urged that the affidavit in support of the warrant did not set forth in sufficient detail the reliability of the information supplied by the confidential informant, so that the issuing magistrate was unable to judge independently the reliability of

[1] Although the Service collected $4,940 from respondent under the levy, the Certificate of Assessments and Payments shows a payment of $5,097 (A. 81). The $157 discrepancy is attributable to money belonging to Levine, which was also seized and applied against the joint assessment against respondent and Levine. However, Levine has not sought a refund of the $157.

the information. The court granted the motion to quash the search warrant and ordered that all items taken pursuant to the warrant be returned to respondent and Levine, except the cash taken by the Internal Revenue Service (Pet. App. 3A-4A; Pltf. Ex. 4, A. 75-80).

Almost two years later, respondent commenced this suit in the United States District Court for the Central District of California, seeking a refund of the $4,940 collected under the levy in partial satisfaction of the $89,026.09 assessment (A. 8-9). The government answered and counterclaimed for $84,210.06, the unpaid balance of the assessment (A. 10-12).[2] In support of its position, the government proffered a copy of the Certificate of Assessments and Payments (Form 4340) (A. 81). Respondent introduced no evidence regarding the correct amount of his tax liability for the period at issue. Instead, he relied solely upon a previously filed motion to suppress the tax assessment, in which he alleged that the information upon which the assessment was based was illegally obtained (A. 13, 20).

At the outset of a hearing, the district court noted that it was "reluctantly holding that the affidavit supporting the search warrant [was] insufficient under the *Spinelli* [*Spinelli* v. *United States*, 393 U.S. 410] and *Aguilar* [*Aguilar* v. *Texas*, 378 U.S. 108]

[2] The $84,210.06 figure is the sum of the assessment plus the interest imposed ($89,026.09 + $123.97) less the $4,940 previously collected (A. 11).

doctrines" (A. 47).[3] The district court determined that all of the evidence utilized as the basis of the tax assessment was "obtained directly or indirectly as a result of the search pursuant to the defective search warrant * * *," so that the assessment was based upon evidence obtained "in violation of [respondent's] Fourth Amendment rights to be free from unreasonable searches and seizures" (Pet. App. 7A).

The district court thereupon upheld respondent's refund claim and dismissed the government's counterclaim with prejudice, stating that "substantially all, if not all" of the evidence utilized by the Internal Revenue Service in making its assessment was illegally obtained, "and, as such, the assessment was invalid." In the district court's view, once it determined that the assessment was based upon illegally obtained evidence, the assessment was invalid. It concluded that respondent "[was] not required to prove the extent of the refund to which he claims he is entitled," but that it was sufficient for him to prove "that substantially all, if not all, of the evidence upon which the assessment was based was the result of illegally obtained evidence" (Pet. App. 7A). The court of appeals affirmed on the basis of the district court's findings of fact and conclusions of law (Pet. App. 12A).

[3] The district court observed later in the hearing that the question of the sufficiency of the affidavit was "a close case" and that it did not regard the affidavit as one "which clearly on its face, without question, * * * [did not] meet the Spinelli and Aguilar requirements" (A. 64).

SUMMARY OF ARGUMENT

This case presents important questions concerning the possible application of the exclusionary rule as an impediment to the enforcement of civil claims by the federal government. In holding that a federal civil tax assessment is invalid because it was based upon evidence obtained by local law enforcement officers pursuant to a defective search warrant, the court of appeals has expanded the scope of the exclusionary rule beyond its traditional role as a rule of evidence. It has also extended to civil proceedings the Fourth Amendment exclusionary rule, which this Court has generally applied only to bar the use of illegally obtained evidence in criminal trials.

Respondent has, following the seizure of his gambling records, twice been the beneficiary of applications of the exclusionary rule. The application of the exclusionary rule by the local court to bar the use of the evidence obtained by the police in respondent's criminal prosecution was a concededly conventional (although not concededly correct) use of that judicially-created remedy to effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures. However, by invalidating the tax assessment because it was based upon illegally seized evidence, the courts below erroneously expanded the scope of the exclusionary principle beyond its proper bounds.

Two distinct lines of decisions by this Court establish the correctness of this proposition. First, this

Court has consistently held that a tax assessment is valid unless the taxpayer affirmatively establishes that he owes no additional tax by proving the correct amount of his liability. Since respondent relied at the initial stage of this proceeding entirely upon the illegality of the search and seizure by the local police and has as yet introduced no proof regarding the correct amount of his liability to show that he owed no additional tax, summary judgment in his favor was inappropriate under the rules governing tax refund and tax collection suits.

Second, the decisions of this Court confirm that the primary purpose of the exclusionary rule is to deter future unlawful police conduct in order to effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures. In this connection, the Court has generally confined the exclusionary remedy to bar the use of illegally seized evidence in criminal trials. But whatever the extent to which the exclusionary principle arguably accomplishes this deterrence objective in criminal cases, this Court has never extended its application to civil cases. Such an extension of the exclusionary rule to invalidate claims that are purely civil in character is not justifiable by reference to the goal of preventing future unlawful police conduct. Indeed, the inapplicability of the deterrence theory is especially evident in this civil case in which the allegedly illegal conduct was engaged in by agents of a local government not a party to this litigation.

A.

1. The present case is composed of two elements: (1) a refund suit brought by respondent; and (2) the post-assessment collection suit brought by the government in its counterclaim. However, the established rule common to both a taxpayer-initiated refund suit and a tax collection action brought by the government is that the Commissioner's assessment is deemed to be valid and that the taxpayer bears the burden of proving that he paid the correct amount of his liability.

In a refund suit, the usual formulation of the rule, as this Court has stated, is that the taxpayer bears the burden of proving the exact amount that he is entitled to recover. It is therefore not sufficient in a refund suit for the taxpayer to show that the assessment was erroneously computed or that it was not based upon trustworthy or competent evidence. For even if the assessment is defective in some respect, the taxpayer still may not have overpaid his tax.

The validity that attaches to the Commissioner's tax assessment in a refund suit is similarly applicable in a suit brought by the government to collect on an assessment. Thus, in a post-assessment collection action it is equally well established that the assessment is deemed to be valid and that the taxpayer has the burden of proving that he paid the correct amount of his liability.

Applying the foregoing principles to this case, it is beyond question that the courts below erred in up-

holding respondent's refund claim and in dismissing the government's counterclaim. Here, respondent introduced no evidence that established that his tax liability was zero, which was necessary in order to entitle him to a refund of $4,940 and a dismissal of the government's counterclaim. In the absence of any evidence casting doubt on the accuracy of the assessment, its presumptive validity should likewise have been controlling.

2. The radical departure by the decision below from the requirements of proof in a civil tax case appears to have been predicated upon an extension of the Fourth Amendment exclusionary rule. However, nothing in the longstanding line of decisions of this Court that a tax assessment cannot be set aside unless the taxpayer proves that he paid the correct amount of his liability suggests a different result if the information upon which the assessment was based might not be competent or admissible in a criminal proceeding against the taxpayer.

Indeed, the only other appellate decision presenting this question reached precisely the opposite result. In *Compton* v. *United States*, 334 F.2d 212, the Fourth Circuit correctly held, on essentially parallel facts, that a civil wagering tax assessment is not invalid even though it was based almost entirely upon evidence illegally obtained by local police officers. As that court stated in terms particularly appropriate to this case: "The difficulty with plaintiff's position is that she apparently misconceives the burden of proof imposed upon her and which

she must sustain in order to establish her claim of entitlement to a refund" (334 F.2d at 216).

Moreover, like *Compton*, this case does not involve an application of the conventional exclusionary rule, which only comes into play to bar the use of illegally obtained evidence at trial. Here, the government never sought to introduce at trial any of respondent's wagering records obtained by the local police at the time of his arrest. Thus, by invalidating the assessment, the decision below utilized a much more radical and unwarranted sanction that the *Compton* court expressly rejected—summary judgment against the government because its cause of action was deemed tainted. In similar circumstances, this Court has held that an indictment is not subject to challenge because the grand jury acted upon the basis of information which would be inadmissible as evidence.

B.

Apart from the fact that the exclusionary rule is not properly applicable in a case in which no illegally obtained evidence is sought to be admitted, the deterrence rationale of the rule has no application to this case. Thus, even if the government had sought to introduce copies of respondent's wagering records into evidence here, the exclusionary principle should not bar the use of such otherwise reliable evidence. As this Court has explained on numerous occasions, the purpose of the rule is to deter unlawful police conduct and not to redress the injury to the privacy of the search victim. In *United States* v. *Calandra*,

414 U.S. 338, the Court observed that the exclusionary rule was not an absolute bar to the use of illegally obtained evidence, and held that the rule did not apply to grand jury proceedings. After balancing the competing interests, the Court "decline[d] to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of public misconduct at the expense of substantially impeding the role of the grand jury" (414 U.S. at 351-352).

As a general proposition, the extension of the exclusionary rule to civil tax cases would seem unrelated to the goal of preventing unlawful police conduct. Indeed, the force of this argument is well illustrated by the facts of this case. Here, the conduct of the local police was entirely directed toward the arrest and prosecution of respondent for violation of local gambling laws. Plainly, the local police did not pursue their investigation of respondent in the hopes of requiring him to pay the federal civil wagering tax imposed by Section 4401 of the Code. Indeed, there is nothing in the record that even remotely suggests that the actions of the police pertaining to respondent were directed by or even known to officials of the Internal Revenue Service. The connection between the illegal search conducted by the police and the civil federal tax assessment is so indirect and attenuated that reliance upon the deterrence rationale would at best involve hazardous speculation. It is wholly unrealistic to assume that local police officers would be deterred from illegal searches

and seizures because a possible federal civil tax liability would be rendered uncollectible. Moreover, it is inappropriate as well as unproductive to relieve taxpayers of a federal civil tax liability for which they would otherwise be liable simply because they have suffered an illegal search at the hands of local authorities.

Finally, it is clear that an extension of the judicially-created exclusionary remedy is particularly unwarranted in this case. Here, there can be no doubt that the actions of the local police were taken entirely in good faith since they sought and obtained permission for their search from a neutral and detached judicial officer. Where police conduct is taken in complete good faith, the Court has indicated that "the deterrence rationale loses much of its force." *Michigan* v. *Tucker*, 417 U.S. 433, 447. Indeed, had the judge who issued the warrant properly performed his duties, the police could have supplied the necessary information to complete the showing of probable cause. It is therefore seriously open to question whether the technical defect in the search warrant justified an application of the exclusionary rule even in the local criminal proceeding against respondent. But whatever the merits of the application of the rule in that prior context, there is no sound justification for the extending the exclusionary principle to punish the federal tax collector for the error of a local police officer or judge.

ARGUMENT

A FEDERAL CIVIL TAX ASSESSMENT IS VALID EVEN THOUGH BASED UPON EVIDENCE OBTAINED BY LOCAL LAW ENFORCEMENT OFFICERS PURSUANT TO A SEARCH WARRANT SUBSEQUENTLY HELD TO BE DEFECTIVE

A. A Tax Assessment Challenged In A Refund Suit Or In A Collection Proceeding Is Deemed To Be Valid Unless The Taxpayer Meets The Burden Of Proving That He Paid The Correct Amount Of His Liability

1. Before discussing the burden of proof principles that govern this civil tax case, it would be appropriate to describe briefly the procedural posture in the district court. In accordance with his authority under Section 6201 of the Internal Revenue Code of 1954, the Commissioner made an assessment against respondent of approximately $89,000. Pursuant to this assessment and his collection power accorded by Section 6331 of the Code, the Commissioner levied upon the $4,940 in cash that had been seized by the local police and applied that sum in partial satisfaction of respondent's tax liability. Respondent thereupon brought this suit seeking a refund of the seized money and the government counterclaimed for the unpaid balance of the assessment.

Thus, the suit before the district court was composed of two separate elements—(1) the refund suit brought by respondent, and (2) the post-assessment collection suit brought by the government. However, the established rule common to both a taxpayer-initiated refund suit and a tax collection action brought

by the government is that the Commissioner's assessment is deemed to be valid and that the taxpayer bears the burden of proving that he paid the correct amount of his liability.

a. In a refund suit, the usual formulation of the rule is that the taxpayer bears the burden of proving the exact amount that he is entitled to recover. It is therefore not sufficient in a refund suit for the taxpayer to show that the assessment was erroneously computed or that it was not based upon trustworthy or competent evidence. This is so because even if the assessment is erroneous in some respect, the taxpayer may still not have overpaid his tax so as to be entitled to a refund. The taxpayer must therefore go further in a refund suit and must affirmatively prove the correct amount of his liability, in order to demonstrate that the government cannot retain the amount claimed under any theory. As this Court stated in *Lewis* v. *Reynolds*, 284 U.S. 281, 283, quoting with approval from the opinion of the court of appeals in that case (48 F.2d 515, 516 (C.A. 10)): "The action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him." Accord: *United States* v. *Anderson*, 269 U.S. 422, 443; *Wickwire* v. *Reinecke*, 275 U.S. 101, 105; *Botany Mills* v. *United States*, 278 U.S. 282, 289-290; *Reinecke* v. *Spalding*, 280 U.S. 227, 232-233; *Stone* v. *White*, 301 U.S. 532, 533-534.

b. Although this Court has not spoken with respect to the burden of proof in a tax collection suit, it is settled that the presumption of validity that attaches to the Commissioner's tax assessment in a refund suit is similarly applicable in a suit brought by the government to collect on an assessment.[1] In such a collection action, the government is the nominal plaintiff. Nevertheless, it does not bear the burden of proof of an ordinary plaintiff in a civil case. As in a refund suit, the assessment is outstanding in a collection action and is armed with the same presumption of administrative regularity, pursuant to which the governmental officers are deemed to have

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[1] Pursuant to Section 6331 of the Code, Congress has authorized the Internal Revenue Service to levy upon a taxpayer's property in order to satisfy an outstanding assessment. Thus, the collection of taxes does not generally involve judicial action. However, Section 7401 of the Code authorizes the Attorney General, at the request of the Internal Revenue Service, to commence a civil action for the collection or recovery of taxes. See also Section 7403 of the Code. Such a suit would ordinarily be brought to protect the revenue where the six-year period of limitations applicable to levies on the assessment is about to expire. See Section 6502 of the Code. Although a lien based upon a judgment in such a collection action is subject to state statutes of limitations (28 U.S.C. 1962; Rule 69(a), Federal Rules of Civil Procedure), the tax lien itself continues to exist independently of the judgment lien (Section 6322 of the Code), and the judgment itself is not subject to any period of limitations. *United States* v. *Hodes*, 355 F.2d 746 (C.A. 2); *United States* v. *Overman*, 424 F.2d 1142 (C.A. 9). Moreover, in order to avoid multiple litigation, it is the policy of the government to counterclaim in a refund suit where, as here, there is an outstanding unpaid assessment and the refund suit and the counterclaim involve the same facts.

acted reasonably and according to law. See *Bob Jones University* v. *Simon*, 416 U.S. 725, 740. Thus, in a post-assessment collection action brought by the Commissioner, it is equally well established that while the underlying merits of his assessment are potentially subject to judicial scrutiny, the assessment is deemed to be valid. The taxpayer accordingly has the burden of proving in a collection suit that he paid the correct amount of his liability. See, *e.g.*, *United States* v. *Rexach*, 482 F.2d 10, 15-18 (C.A. 1), certiorari denied, 414 U.S. 1039; *Crosby* v. *United States*, 496 F.2d 1384, 1390 (C.A. 5); *Psaty* v. *United States*, 442 F.2d 1154, 1158-1161 (C.A. 3); *Plisco* v. *United States*, 306 F.2d 784, 786 and n. 2 (C.A.D.C.), certiorari denied, 371 U.S. 948.

The rule imposing this stringent burden of proof on a taxpayer challenging an assessment in a tax collection suit is premised upon the nature and effect of a federal tax assessment. Since "taxes are the life-blood of government, and their prompt and certain availability an imperious need," *Bull* v. *United States*, 295 U.S. 247, 259, a unanimous Court pointed out that "[t]he assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt" (*id.* at 260). While the Court made this observation in the context of a refund suit, it has equal force in a collection action where the presumption of correctness attending the assessment relieves the government of the requirement imposed on an ordinary claimant in a

civil case to go forward and prove the amount it is owed. Indeed, the issuance of the assessment does much more than simply relieve the government of the burden of going forward with proof of the correctness of its tax claim. It shifts the entire burden to the taxpayer in any subsequent suit for refund to prove that he paid the correct amount of his liability. As the Court succinctly stated in *Bull*, "the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer" (295 U.S. at 260).

The requirement that the taxpayer in a tax collection proceeding prove that he paid the correct amount of his liability is consistent with the burden of proof rule applicable in the Tax Court. Since this Court has long held that a taxpayer bears the burden of proving the Commissioner's determination of a deficiency erroneous in a pre-assessment Tax Court proceeding (*Lucas* v. *Structural Steel Co.*, 281 U.S. 264, 271; *Welch* v. *Helvering*, 290 U.S. 111, 115), it would be anomalous to impose the burden of proof upon the government in a tax collection proceeding. Such an inversion of the burden of proof would encourage taxpayers to permit delinquent taxes to be assessed and sued for by the government, thereby adding immeasurably to the costs of collection. Moreover, the established burden of proof rule in tax collection proceedings is premised upon sound public policy considerations since it is far more likely that the taxpayer will have greater access to the relevant

information needed to establish the correct amount of liability. Thus, the rule buttresses the requirements of Section 6001 of the Code, which prescribes that "Every person liable for any tax * * * shall keep such records * * * and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe."

2. Applying the foregoing principles governing tax refund and collection suits to this case, it is beyond question that the courts below erred in upholding respondent's refund claim and in dismissing the government's counterclaim. With respect to his claim for a refund, respondent introduced no evidence that established that his tax liability for the period in question was zero so as to be entitled to a refund of $4,940. If any such evidence existed, it would presumably have been within respondent's ability to present it. Indeed, respondent did not even allege in his complaint (A. 8-9), much less prove, that he was not engaged in accepting wagers subject to the civil wagering tax imposed by Section 4401 of the Code.[5] On this record, therefore, it was impossible for the district court to conclude that the government had erroneously collected $4,940 from respondent. Under the controlling principle of this Court's de-

[5] Moreover, respondent neither alleged nor proved, as required by Section 6419 of the Code, that he had not collected the tax from the persons who placed the wagers on which the tax was imposed. Under these circumstances, the district court was prohibited from upholding respondent's claim for refund. See *Gordon* v. *United States*, 451 F.2d 1354 (C.A. 9), and cases cited therein.

cision in *Lewis* v. *Reynolds*, 284 U.S. 281, respondent had as yet shown no basis upon which he could be granted summary judgment in his refund suit. Similarly, respondent had so far failed to introduce any evidence satisfying his burden of proving that his correct tax liability was zero or any amount less than the assessment. Thus, if any party was entitled to judgment on the government's counterclaim, it was the government rather than respondent. In the absence of any evidence casting doubt on the accuracy of the assessment, its presumptive validity should likewise have been controlling.[6]

[6] The result would be the same in a pre-assessment proceeding for redetermination of a deficiency brought by the taxpayer in the Tax Court. As we have pointed out at p. 19, *supra*, the taxpayer has the burden in the Tax Court of proving that the Commissioner's determination is incorrect. See Rule 142(a) of the Rules of Practice and Procedure of the United States Tax Court (1974); *Welch* v. *Helvering*, *supra*, 290 U.S. at 115; *Lucas* v. *Structural Steel Co.*, *supra*, 281 U.S. at 271. Thus, the taxpayer's burden of proof in the Tax Court cannot be met by showing that the Commissioner's determination was based upon information that may be inadmissible in court or excludable in a criminal proceeding. The Commissioner's determination is presumptively correct and the taxpayer must affirmatively prove that it is erroneous on the merits.

There is accordingly no support for the "exclusionary" remedy imposed by the Tax Court in *Suarez* v. *Commissioner*, 58 T.C. 792. There, the court held that the Commissioner's notice of deficiency carried no presumption of correctness where the deficiency was based upon illegally obtained evidence. The court thereby shifted the burden of going forward to the Commissioner to establish the deficiency with independent untained evidence. Upon the Commissioner's refusal to go forward with such proof, the court entered a decision in the

3. The courts below did not expressly reject the burden of proof principles governing tax refund suits and collection proceedings. However, the radical departure from the requirements of proof in such cases by the decisions below appears to have been predicated upon an extension of the Fourth Amendment exclusionary rule first enunciated by this Court in *Weeks* v. *United States*, 232 U.S. 383. Under that rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. See also *Mapp* v. *Ohio*, 367 U.S. 643. In holding that the assessment "must be suppressed and quashed as being violative of * * * [respondent's] Fourth Amendment rights to be free from unreasonable search and seizure" (Pet. App. 8A), the district court apparently concluded that collection of the tax due under the assessment would abridge respondent's constitutional rights. Thus, with respect to the refund suit, the district court concluded that "[respondent

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taxpayers' favor. *Suarez* v. *Commissioner*, 61 T.C. 841. Indeed, the fact that the Code shifts the burden of proof to the Commissioner in precisely defined situations (see, *e.g.*, Sections 534, 6902(a), 7454) strongly suggests that the Tax Court is not generally empowered to shift the burden to the Commissioner to establish the deficiency.

Moreover, as we argue in Part B, *infra*, pp. 32-35, the application of an exclusionary remedy in the Tax Court in a civil tax case such as *Suarez* would not further the deterrence of unlawful police conduct. As in this case, the illegal search in *Suarez* was carried out by local police officers. The Internal Revenue Service subsequently learned of the taxpayer's arrest from a press report (see 58 T.C. at 798).

was] not required to prove the extent of the refund to which he claims he is entitled" (Pet. App. 7A). In the court's view, it was "sufficient that [respondent] prove that substantially all, if not all, of the evidence upon which the assessment was based was the result of illegally obtained evidence" (*ibid.*). Under similar reasoning, the court dismissed the government's counterclaim because it was based upon the tax assessment that it held to be invalid.

However, nothing in the longstanding line of decisions of this Court and others holding that a tax assessment cannot be set aside unless the taxpayer proves that he paid the correct amount of his liability suggests that the rule should be otherwise if the information upon which the assessment was based might not be competent evidence or admissible in a criminal proceeding against the taxpayer. Indeed, the other appellate decision presenting this question reached precisely the opposite result. In *Compton* v. *United States*, 334 F.2d 212, the Fourth Circuit held, on essentially parallel facts, that a civil wagering tax assessment is not invalid even though based almost entirely upon evidence consisting of gambling paraphernalia and records obtained in an illegal search conducted by local police officers, the fruits of which were made available to agents of the Internal Revenue Service.

As in this case, the illegality of the search in *Compton* arose on account of a defect in the warrant issued to the local police. After reviewing the decisions of this Court holding that the taxpayer bears

the burden of proof in a refund suit, the Fourth Circuit rejected the taxpayer's refund claim, ruling that she had not borne the burden in this case, and observing that the mere fact that the assessment was premised upon the fruits of an illegal search was "not decisive of the issues here" (334 F.2d at 215-216). In *Compton* there was a trial, and the government did not seek to introduce at the trial any of the physical evidence obtained as a result of the illegal search, although it did cross-examine the taxpayer concerning her knowledge of the property obtained in the search. Cf. *Walder* v. *United States*, 347 U.S. 62. Thus, the exclusionary principle invoked by the taxpayer in support of her refund claim was no more applicable in *Compton* than in the instant case.

In our view, the Fourth Circuit in *Compton* correctly held that a federal tax assessment is not rendered invalid in a tax refund or collection suit simply on a showing that it is based on illegally obtained evidence. Moreover, like *Compton*, this case does not involve an application of the conventional exclusionary rule, which only comes into play to bar the use of illegally obtained evidence at trial. Here, the government never even sought to introduce at trial any of respondent's wagering records obtained by the local police at the time of his arrest.[7] Thus, by in-

[7] The government did proffer a certified copy of the assessment (Def. Ex. A, A. 81). The introduction into evidence of a copy of the assessment is the accepted method of establishing the presumptively correct basis of the liability in a tax collection suit. See *Psaty* v. *United States*, 442 F.2d 1154, 1159 (C.A. 3). Here, however, respondent stipulated that the copy of the assessment was admissible without objection (A. 20).

validating the assessment, the courts below utilized a much more radical and unwarranted sanction, one which the *Compton* court expressly rejected and which is not within the traditional scope of remedies for Fourth Amendment violations—summary judgment against the government because its cause of action was deemed tainted.

4. Finally, we submit that this case does not present an appropriate occasion to depart from traditional doctrine by expanding the exclusionary principle from a rule of evidence to a rule of preclusion of "tainted" causes of action. The invalidation of the assessment on the ground that it was based upon illegally obtained evidence is contrary to the broad statutory power given the Commissioner to make tax assessments. Pursuant to Sections 7801(a) and 7802 of the Code, the Secretary of the Treasury, through his delegate the Commissioner of Internal Revenue, is charged with the "administration and enforcement" of the revenue laws. Consistent with this responsibility, the Commissioner is "authorized and required" by Section 6201(a), "to make the inquiries, determinations, and assessments of all taxes * * *" and by Section 6301 to "collect the taxes imposed by the internal revenue laws." Finally, in order that these statutory duties may be discharged effectively, the Internal Revenue Service in Section 7601(a) is empowered "to proceed, from time to time, through each internal revenue district and inquire after and

concerning all persons therein who may be liable to pay any internal revenue tax * * *."

As this Court observed last Term in *United States* v. *Bisceglia*, 420 U.S. 141, 145, 147-148, the Commissioner's statutory power to inquire is a "broad mandate" analogous to the far-reaching inquisitorial powers of a grand jury. See also *United States* v. *Powell*, 379 U.S. 48, 57. Like the grand jury, the proceedings of which are not impeded by the exclusionary rule, *United States* v. *Calandra*, 414 U.S. 338, the Commissioner is obligated to consider information from widely-drawn sources concerning possible noncompliance with the tax laws. Accordingly, the Commissioner is fully empowered to receive and make use of reliable information from third parties even though such information may be incompetent for purposes of admissibility in court or excludable in a criminal proceeding brought against the taxpayer. If he failed to consider such information, he would be remiss in discharging his statutory duties.

Thus, the assessment in this case should not be deemed invalid simply because the Commissioner analyzed material illegally obtained by the Los Angeles police. To the contrary, the validity of the civil assessment would appear to follow *a fortiori* from the unanimous decisions of this Court holding that an indictment is not subject to challenge because the grand jury acted upon inadequate or incompetent evidence, or even on the basis of information obtained in violation of the defendant's privilege against self-incrimination. See, *e.g.*, *Costello* v. *United States*,

350 U.S. 359; *United States* v. *Blue*, 384 U.S. 251, 255, and n. 3. As the Court stated in the latter case, "Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book" (*id.* at 255).

In light of the Court's refusal to dismiss a criminal indictment based upon incompetent or constitutionally excludable evidence, there is no sound basis for the invalidation of the civil assessment by the decision below. Just as there are strong imperatives supporting the grand jury's power to bring a criminal proceeding, there are also compelling policy reasons in favor of insuring that the ordinary civil liabilities imposed by the tax system established by Congress are borne equitably by all persons, including those who may be victims of an illegal search and seizure. Given the present uncertainty over the efficacy of the exclusionary rule in deterring unlawful police conduct, the sanction of defeating the collection of the revenues should be imposed only when it would unquestionably further the primary deterrence objective of the rule.

To be sure, the Court's decisions upholding the validity of an indictment based upon tainted evidence can be distinguished on the ground that such evidence will be excludable at the criminal trial. Un-

like the case of a civil tax assessment which is deemed valid unless the taxpayer proves the correct amount of his liability, the defendant in a criminal case would not be convicted if the indictment is based solely upon illegally obtained evidence. Despite this difference, we submit that there is here no sufficient justification for expanding the traditional scope of the exclusionary rule to something broader than a rule of evidence. Such an expansion could be supported only on the basis that it would meaningfully further the policies underlying the exclusionary rule. As we shall now demonstrate, however, the deterrence theory of the exclusionary rule has no meaningful application to this case, in which the search was conducted by local and not federal authorities and the evidence was not used to punish respondent but simply as a means of collecting the tax for which he would otherwise have been liable. Thus, even if the government had sought to introduce into evidence the wagering records obtained by the local police, the exclusionary rule should not have impeded the enforcement of a federal tax claim that was civil in character.

B. The Exclusionary Rule Should Not Be Applied In This Civil Tax Case

Even if this case were viewed as a conventional application of the exclusionary rule to bar the introduction of tainted evidence (presumably by equating the assessment with evidence of a more traditional sort), there are compelling reasons why this Court should hold that the exclusionary principle is inapplicable to civil cases in these circumstances. First and foremost, the practice of excluding illegally seized evidence is primarily justified by the belief that the cost of such a measure is outweighed by the benefits to be derived in meaningful deterrence of unlawful official conduct. If the marginal deterrent effect of a particular application of the exclusionary principle appears to be slight, as is demonstrably the case when its use in civil litigation is at issue, it ceases to be justified.

Second, this is a case in which such illegality as occurred (and this is indeed a case of borderline misconduct at worst) was committed entirely by local authorities, who are not a party to this case and have no interest in the enforcement of federal civil tax laws. Whatever the merits of the "silver platter" prohibition in criminal cases (see *Elkins* v. *United States*, 364 U.S. 206, 208), it seems unreasonable and unnecessary to deprive innocent parties to civil litigation of relevant evidence because of the misconduct of third parties having no interest in the litigation. Finally, this is not a case in which illegally seized evidence is being used for the purpose of punishing the victim of the search, but rather it is simply being used to require him to comply with civil obligations equally imposed upon all similarly situated persons. In sum, as we discuss more fully below, the judgment of the court of appeals in this case serves neither to further the deterrent purposes of the exclusionary rule nor to protect the judicial process from complicity in distasteful practices.

1. In holding that the Commissioner's tax assessment against respondent "must be suppressed and quashed as being violative of * * * [his] Fourth Amendment rights to be free from unreasonable search and seizure" (Pet. App. 8A), the district court concluded that enforcement of the assessment was barred by the exclusionary rule. That rule originated in *Weeks* v. *United States*, 232 U.S. 383, where the Court held that evidence seized by federal officers in violation of the Fourth Amendment was inadmissible in a federal criminal trial of the victim of the search. In *Wolf* v. *Colorado*, 338 U.S. 25, the Court recognized that the protections of the Fourth Amendment were applicable to state as well as federal action, but it declined to impose the exclusionary rule as a required method of enforcement. Finally, in *Mapp* v. *Ohio*, 367 U.S. 643, the Court overruled *Wolf* and imposed the exclusionary rule on the States, holding that the failure to exclude evidence that state officers had obtained by an unreasonable search and seizure violated the defendant's rights under the due process clause of the Fourteenth Amendment.

As the Court explained in *Elkins* v. *United States*, 364 U.S. 206, the purpose of the rule is to deter unlawful police conduct and not to redress the injury to the privacy of the search victim. "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it" (*id.* at 217).

See also *Linkletter* v. *Walker*, 381 U.S. 618, 637. Accord: *Mapp* v. *Ohio*, *supra*, 367 U.S. at 656; *Tehan* v. *Shott*, 382 U.S. 406, 413; *Terry* v. *Ohio*, 392 U.S. 1, 29.

Accordingly, the Court has never interpreted the exclusionary rule to prohibit all uses of illegally seized evidence in all proceedings and against all persons. Rather, it has restricted the application of the rule to those situations in which the primary objective of the rule to prevent future unlawful police conduct would best be served. "[T]he rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease." Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 389 (1964).

Thus, for example, in *Walder* v. *United States*, 347 U.S. 62, the Court refused to apply the exclusionary rule to bar the use of illegally obtained evidence to impeach the credibility of the defendant. See also *Harris* v. *New York*, 401 U.S. 222. Similarly, in *Jones* v. *United States*, 362 U.S. 257, 261, the Court recognized a standing requirement under which the rule may not be invoked by one who was not the victim of the unlawful search. See also *Alderman* v. *United States*, 394 U.S. 165, 173-175. Most recently, in *United States* v. *Calandra*, 414 U.S. 338, the Court concluded that the exclusionary rule did not apply to grand jury proceedings. As a result, a grand jury witness was held to be required to answer questions even though they were based upon

leads that were the product of an illegal search and seizure.

In each of those cases, the harm resulting from exclusion of evidence was thought to outweigh the possibility that future unlawful police conduct would be deterred. Thus, in deciding whether to extend the exclusionary rule to grand jury proceedings in *Calandra*, the Court balanced the potential harm to the functions of the grand jury against the potential benefits of the rule in such a context. It first concluded that the exclusionary rule would greatly interfere with the effective discharge of the grand jury's duties. On the other hand, the Court regarded an extension of the rule to grand juries as likely to have significant marginal deterrent effect only in the case of police investigation consciously directed toward discovery of evidence solely for use in a grand jury investigation. On this balance of the competing interests, the Court "decline[d] to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury" (414 U.S. at 351-352; footnote omitted).

2. Employing the *Calandra* analysis and balancing the potential harm resulting from exclusion against the possible benefits to be derived from deterring unlawful police conduct, it becomes plain that the exclusionary rule should have no application to civil cases generally and to this civil tax case in particular—even if the government had sought

to introduce copies of respondent's wagering records into evidence.

Here, the sole violation of respondent's Fourth Amendment rights occurred when the Los Angeles police obtained his wagering records pursuant to a defective search warrant. Although that injury has occurred and cannot be undone, future similar police conduct was arguably deterred when respondent's prosecution under the local bookmaking ordinance was dismissed. The subsequent civil tax assessment based upon respondent's wagering records was not a separate violation of his Fourth Amendment rights, and a second application of the exclusionary rule in this case would accomplish nothing more than to relieve respondent of his obligation to pay a tax that other similarly situated persons are required to pay. See *United States* v. *Calandra*, *supra*, 414 U.S. at 354. In light of the widespread uncertainty over the utility of the exclusionary rule in deterring unlawful police conduct in criminal cases,[8] the sanction of defeating the revenues because of the error of a local policeman should be imposed, if ever, only when it is beyond question that an extension of the rule to a civil tax case would further the primary deterrence rationale.

As a general proposition, the extension of the exclusionary rule to civil cases would seem unrelated

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[8] The practical effect of the rule upon unlawful police behavior has been broadly disputed. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 424-427 (appendix to dissenting opinion of Chief Justice Burger); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 755-756 (1970).

to the goal of preventing future unlawful police conduct. As the Court stated in *Calandra*: "[T]he need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a *criminal sanction* on the victim of the search" (414 U.S. at 348; emphasis supplied).

The force of this argument is well illustrated by the facts of this case. Here, the conduct of the Los Angeles police was entirely directed toward the arrest and prosecution of respondent for violation of local gambling laws. Plainly, the local police did not pursue their investigation of respondent in the hope of requiring him to pay the federal wagering tax imposed by Section 4401 of the Code. Moreover, there is nothing in the record that even remotely suggests that the activities of the local police pertaining to respondent were directed by or even known to officials of the Internal Revenue Service or of any other federal agency.[9] The inapplicability of the deterrence theory is especially evident in this case, since it is wholly unrealistic to assume that local police officers would be deterred from illegal searches be-

[9] One of the police officers who conducted the search explained that there was no official police department policy to notify the Internal Revenue Service after a bookmaking arrest. He testified that he made an individual decision to call the Internal Revenue Service "as a matter of police procedure." As he stated, "here's a person that was involved in a crime that had this kind of money, and I thought of Internal Revenue" (A. 42). However, he further testified that he did not think that every member of the police force would have so notified the Internal Revenue Service (*ibid.*).

cause a possible federal civil tax liability would be rendered uncollectable. The connection between the illegal search conducted by the Los Angeles police and the civil federal tax assessment made against respondent is so indirect and attenuated that reliance upon the deterrence rationale would at best involve hazardous speculation. Compare *Elkins* v. *United States*, 364 U.S. 206, 211-214, and cases cited therein. Thus, the federal government should not be barred from making use of evidence obtained by the local police in order to enforce a civil tax claim.

3. Given the Court's refusal to apply the exclusionary rule to cases in which its primary deterrent purpose would not be served, it is hardly surprising that it has never extended the rule to civil cases. The closest it has ever come is in *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, where the rule was applied to exclude illegally obtained evidence in a forfeiture proceeding against an automobile used to evade a state liquor tax. However, the Court was careful to rest the decision upon the fact that "a forfeiture proceeding is quasi-criminal in character" because "[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law" (380 U.S. at 700).[10] See also *Cleary* v.

[10] In describing the nature of a forfeiture proceeding in *Plymouth Sedan*, the Court referred to *Boyd* v. *United States*, 116 U.S. 616, which held that the Fifth Amendment barred the compulsory production of a person's private papers in a forfeiture proceeding. In *Boyd*, the Court also noted that "suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature,

Bolger, 371 U.S. 392, 403 (concurring opinion of Mr. Justice Goldberg).[11] The Court's recognition that the exclusionary rule is applicable to forfeiture proceedings because of their quasi-criminal character[12] suggests that the exclusionary rule should not apply to impede the enforcement of a civil claim.[13]

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* * * [and] are within the reason of criminal proceedings for all the purposes of the Fourth Amendment * * *" (116 U.S. at 634).

[11] See also *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, upholding the constitutionality of a Puerto Rican statute providing for the seizure and forfeiture of vessels used for unlawful purposes, where the Court stated: "Forfeiture of conveyances that have been used—and may be used again—in violation of the narcotics laws *fosters the purposes served by the underlying criminal statutes*, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable" (416 U.S. at 686-687; emphasis supplied).

[12] The courts of appeals have similarly applied the exclusionary rule to forfeiture proceedings. See, *e.g.*, *Berkowitz* v. *United States*, 340 F.2d 168 (C.A. 1); *United States* v. *Physic*, 175 F.2d 338 (C.A. 2); *United States* v. *Butler*, 156 F.2d 897 (C.A. 10); and *Walker* v. *United States*, 125 F.2d 395 (C.A. 5).

[13] While the Court has held that a claim of the privilege against self-incrimination precluded a criminal conviction for failure to register and pay the wagering and occupational taxes imposed by Sections 4401 and 4411 of the Code, it did not hold that the tax as such was constitutionally impermissible or that the claim of privilege extinguished the civil liability for the tax. See, *e.g.*, *Marchetti* v. *United States*, 390 U.S. 39, 44, 61; *Grosso* v. *United States*, 390 U.S. 62, 69-70, n. 7. See also *United States* v. *Sullivan*, 274 U.S. 259. Similar taxes have been held to be valid revenue-raising measures. See, *e.g.*, *United States* v. *Sanchez*, 340 U.S. 42, 44-45; *Sonzinsky* v. *United States*, 300 U.S. 506, 513-514; *Magnano Co.* v. *Hamilton*, 292 U.S. 40, 47.

While several lower federal courts have extended the application of the exclusionary rule to civil cases in which the government is a party, those decisions have relied upon two legal premises which have been undermined by subsequent decisions of this Court. First, the lower courts have invoked the broad dictum of *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392—that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[14] But such principles as the Fourth Amend-

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[14] See, *e.g.*, *Pizzarello* v. *United States*, 408 F.2d 579 (C.A. 2) (reversed order denying injunction of wagering tax assessment based upon illegal search by Internal Revenue Service); *Knoll Associates, Inc.* v. *Federal Trade Commission*, 397 F.2d 530 (C.A. 7) (documents known to be stolen excluded from evidence in Federal Trade Commission hearing); *Suarez* v. *Commissioner*, 58 T.C. 792 (burden of going forward with evidence to establish deficiency shifted to Commissioner where deficiency based upon evidence illegally obtained by local police). Both *Pizzarello* and *Suarez* heavily relied upon the *Silverthorne* dictum. See 408 F.2d at 585; 58 T.C. at 801-802.

Contra: *Chavez-Raya* v. *Immigration and Naturalization Service*, C.A. 7, No. 74-1482, decided July 16, 1975 (failure to give *Miranda* warnings does not render alien's statement inadmissible in deportation proceeding because of its civil character); *National Labor Relations Board* v. *South Bay Daily Breeze*, 415 F.2d 360 (C.A. 9), certiorari denied, 397 U.S. 915 (stolen documents held admissible in Labor Board proceeding); *United States ex rel. Sperling* v. *Fitzpatrick*, 426 F.2d 1161 (C.A. 2) (exclusionary rule held inapplicable to parole revocation proceeding). See also *Honeycutt* v. *Aetna Insurance Co.*, 510 F.2d 340 (C.A. 7), certiorari denied, No. 74-1306, June 9, 1975 (exclusionary rule not

ment standing and retroactivity doctrines clearly demonstrate that the foregoing statement has not survived in full force. Thus, in *United States* v. *Calandra*, *supra*, 414 U.S. at 352-353, n. 8, the Court stated that it has never interpreted the Fourth Amendment exclusionary remedy to proscribe the use of illegally obtained evidence in all circumstances and concluded that the *Silverthorne* dictum had been "substantially undermined by later cases."

The exclusion of illegally obtained evidence in a civil case has also been justified on the related ground that it was required by "the imperative of judicial integrity" involved in *Elkins* v. *United States*, *supra*, 364 U.S. at 222.[13] Under this view, the introduction of illegally obtained evidence would make the courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold" (*id.* at 223). But the foregoing observations regarding the *Silverthorne* statement are equally apposite to demonstrate that this statement is not absolute in its application. Moreover, in *United States* v. *Peltier*, No. 73-2000, decided June 25, 1975, the Court recognized the limitations upon "the imperative of judicial integrity" as an independent rationale for the application of the exclusionary rule. While the Court acknowledged (slip op. 5) that "the imperative of judicial integrity" played a role in the formulation of

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applicable in civil cases between two private parties to bar introduction of evidence illegally obtained by state and local fire and police officials.

[13] See *Suarez* v. *Commissioner*, *supra*, 58 T.C. at 805.

the exclusionary rule, it further observed (slip op. at 7) that the approach was conceptually parallel to the balancing analysis it applied in *Calandra* in determining whether the deterrence rationale would be served by a particular extension of the exclusionary rule.

After reviewing its exclusionary rule retroactivity decisions, the Court stated in *Peltier* that the "imperative of judicial integrity" would not be offended "if law enforcement officials reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution" (slip. op. at 7) (emphasis in original). Thus, the Court concluded that "[i]f the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment" (slip op. at 11). See also *Michigan* v. *Tucker*, 417 U.S. 433, 447.

Applying the foregoing analysis to the facts of this case, it is clear that an extension of the judicially-created exclusionary remedy is particularly unwarranted in this context. Here, the exclusionary rule had its full measure of desired impact on police behavior; the local law enforcement officers, manifestly acting in complete good faith, followed the procedure of "antecedent justification before a magistrate that is central to the Fourth Amendment." *Eaton* v. *Price*,

364 U.S. 263, 272 (separate statement of Brennan, J.). Indeed, had the judge who issued the warrant properly performed his duties, the police almost surely could have supplied the necessary information to complete the showing of probable cause. The constitutional "violation" here was purely technical and was attributable to the judiciary rather than to the police.[16] There having been no flagrant abridgement of respondent's Fourth Amendment rights (see *Brown* v. *Illinois*, No. 73-6650, decided June 26, 1975, (Powell, J., concurring in part, slip op. 5-7)), "the deterrence rationale loses much of its force" (*Michigan* v. *Tucker*, *supra*, 417 U.S. at 447). It is therefore seriously open to question whether the technical defect in the search warrant justified an application of the exclusionary principle even in the local criminal proceeding against respondent.[17] But whatever the merits of the application of the rule in that prior context, there is no sound justification for extending the exclusionary principle to punish the federal tax collector for the error of a local police officer or judge.

[16] Indeed, the difficulty of applying the rule of *Spinelli* v. *United States*, 393 U.S. 410, the basis upon which the search warrant against respondent was held defective, was acknowledged by the district court (A. 47, 64) and is amply illustrated by the proliferation of views in *United States* v. *Harris*, 403 U.S. 573, where the Court's judgment was accompanied by five separate opinions.

[17] To the extent that the "imperative of judicial integrity" is rooted in the notion that it is offensive for courts to permit parties to litigation to further their cause by reliance upon the fruits of their own illegal conduct, no such consideration is present here, since the federal government's hands are unsullied by any illegality.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and the case remanded to the district court for trial.[18]

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AUGUST 1975.

[18] In its pre-trial order, the district court stated that if it rejected respondent's exclusionary rule claim, the following issues of fact remained to be litigated (A. 19-20):

> A. Whether the plaintiff was engaged in bookmaking activities during the period of September 14, 1968 through November 30, 1968?
>
> B. If the plaintiff was engaged in bookmaking activities during the period of September 14, 1968 through November 30, 1968, what were the extent of these activities, and, in particular, what was the gross volume of said activities?
>
> C. If the plaintiff was engaged in bookmaking activities during the period of September 14, 1968 through November 30, 1968, what is his correct federal tax liabilities resulting from said bookmaking activities?

Accordingly, if the judgment of the court of appeals is reversed, we believe that a proper disposition of the case would be a remand to the district court to permit respondent an opportunity to prove that he owed no wagering taxes for the period in question.

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